Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

NATIONAL ALTERNATIVE FUELS ASSOCIATION,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and Michael O. Leavitt, Administrator, Environmental Protection Agency,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a person aggrieved by an agency rule can be denied due process and their First Amendment right to petition the court for redress for injuries suffered, for failure to comply with an unwritten rule of the circuit which requires a petitioner to establish their Article III standing in the opening brief, even though the agency being challenged is well aware of the standing of the petitioner and even though the standing of the petitioner is unquestionable.

List of Parties and Corporate Disclosure Statement

Petitioner - NAFA is a not-for-profit association, not a corporation.

Respondent - Environmental Protection Agency

Intervenors - Not shown in the caption are: Alliance of Automobile Manufacturers and Association of International Manufacturers, Inc., who did participate as Intervenors in the case below - despite the fact that their only claim to standing was that they relied upon the rule and they would be injured if the rule was changed - i.e., they claimed a vested interest in maintaining the existing state of the law.

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I. The court of appeals arbitrarily denied Petitioner due process and its First Amendment right to petition the court for redress for injuries suffered, for failure to comply with an unwritten rule of the circuit which requires a petitioner to establish their Article III standing in the opening brief, even though the agency being challenged is well aware of the standing of the petitioner and even though the standing of the petitioner should be unquestionable 8

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OPINIONS BELOW

The Judgment and accompanying Memorandum of the District of Columbia Circuit Court of Appeals was entered February 25, 2005, and a copy of the Judgment and Memorandum is attached as Appendix B.

JURISDICTION

The court of appeals dismissed NAFA'a petition for review of the Final Rule in its Judgment of February 25, 2005 - for *alleged* failure to establish standing. Appendix B. The court of appeals denied the petition for rehearing or rehearing *en banc* on May 13, 2005. Appendix A. This petition follows. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Solicitor General has been provided a copy of this petition as required by Rule 29.4(a), as has the Environmental Protection agency.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

5 U.S.C. § 702 provides:

Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

Petitioner NAFA filed its petition for agency review pursuant to 5 U.S.C. § 702 and FRAP 15(a). The circuit court had jurisdiction and venue was correct to hear this case pursuant to 5 U.S.C. §§ 702-704. Petitioner NAFA's timely petition for review was filed on April 7, 2000, within 60 days of the publication of the final rule, which rule was published in the Federal Register at 65 Fed. Reg. 6698 on February 10, 2000.

This case involves a petition to review the Environmental Protection Agency's 2000 final rule establishing new emission standards ("Tier 2 standards") for passenger cars, light trucks, and larger passenger vehicles - re: **Control of Air Pollution From New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6698 (2000); issued by the** Environmental Protection Agency on February 10, 2000. This final rule imposed new limitations requiring refiners to reduce the amount of sulfur in gasoline nationwide. Petitioner NAFA has challenged the requirements for sulfur reduction as being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts.

In public comments, Petitioner NAFA proposed the use of alternative technologies which EPA arbitrarily declined to consider. This alternative technology would satisfy the emission reduction goals of EPA without the multibillion dollar national sulfur removal required by EPA. American automobile gasoline consumers would reap the financial benefit of much lower gasoline prices on fuels utilizing the alternative technology.

The circuit court dismissed Petitioner NAFA's petition for review, finding that NAFA had failed to establish standing. See Order and Memorandum at 1, Appendix B. Before the court dismissed the case, the court had also denied Petitioner a timely Motion for Extension of Time to submit the Petitioner's Brief, even though Petitioner had shown extraordinary justification - a person who would have provided vital and essential assistance to counsel in preparing

the Petitioner's Brief - Petitioner's expert, Melvin Ingalls - was unavailable to provide assistance within the original briefing schedule. See Appendix E, Order of August 27, 2004. EPA had opposed the extension of time - without claiming any prejudice - and the extension was then arbitrarily denied.

The Petitioner's Reply Brief (which contained further allegations as to standing) was later struck by the court, and not considered, again without any reasoning or explanation from the court. See Appendix C, Order of January 28, 2005.

On September 23, 1999, Petitioner NAFA submitted its comments in response to the Notice of Proposed Rule Making. NAFA commented that it disagreed with EPA's position that sulfur must be reduced in order to achieve proposed Tier 2 NOx requirements. NAFA pointed out that the final rule would have the deleterious effect of significantly reducing coolant aerosols in the atmosphere.

NAFA commented that EPA should consider alternative technology (EPA knew NAFA (through Bill Orr, its Chairman) was associated with research on this technology because EPA was funding the research) which would allow proposed NOx emission standards to be met without the exorbitantly expensive need to remove or reduce sulfur in all gasoline nationwide. NAFA described an additive fuel technology for oxygenated fuels where the additive contained already-approved (under § 211 of the Clean Air Act) ingredients. This additive fuel technology enhanced catalyst activity and prevented phosphorous poisoning of catalysts. The resulting enhanced combustion product would reduce a broad range of emissions, including HC, CO, toxic, N2O, NOx, particulate, and other exhaust emissions. NAFA

showed EPA test results and scientific literature backing up its claims. EPA responded as follows:

COMMENT C: One commenter provided significant comment and attachments related to the use of fuel additives for achieving the desired emission reductions. Specifically, the commenter provided information on the use of oxygenate plus an organic manganese compound. The commenter argues that this approach shows the capability to achieve emission reductions using existing catalytic technology and existing fuel sulfur levels.

Commenter attaches various data and information related to this approach. The commenter recommends that EPA delay the Tier 2 rulemaking until complete tests can be conducted to determine the viability of this approach. The commenter also notes that the approach would be far less costly because the refinery modifications would not be required and the existing catalytic technology could continue to be used.

RESPONSE: We did not propose alternate means to getting the emissions reductions we identified in our proposal because of the clear connection we made between gasoline sulfur levels and catalyst performance. Our purpose in controlling gasoline sulfur is to enable and ensure the overall emissions performance of Tier 2 vehicles, not simply to get NOX emissions. We do not believe that the recommended approach would get the same emissions benefits as gasoline sulfur control because it would still allow the emissions performance of Tier 2 catalysts to be degraded by exposure to unreasonably high sulfur levels and because we are uncertain about